

**O'Daniel Trucking Co. and Southern Illinois Laborers' District Council, affiliated with Laborers' International Union of North America, AFL-CIO. Case 14-CA-22035**

December 11, 1992

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT  
AND RAUDABAUGH

On August 12, 1992, the General Counsel of the National Labor Relations Board issued a complaint alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 14-RC-11134. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed its answer admitting in part and denying in part the allegations in the complaint.

On October 21, 1992, the General Counsel filed a Motion for Summary Judgment and brief in support. On October 23, 1992, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On November 9, 1992, the Respondent filed a response, and on November 20, 1992, the General Counsel filed a reply thereto.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

**Ruling on Motion for Summary Judgment**

In its answer and response to the Notice to Show Cause, the Respondent admits its refusal to bargain but attacks the validity of the certification on the basis of its objections to the election and the Board's unit determination in the representation proceeding. In addition, the Respondent in its response seeks to amend its answer to allege as an affirmative defense that, since on or about July 23, 1992,<sup>1</sup> the Charging Party Union has itself refused to bargain by advising that it would not sign any agreement with the Respondent other than the agreement it has negotiated with other employers, and has also engaged in various secondary conduct to force other employers to cease doing business with the Respondent. The Respondent contends that these new allegations raise factual issues as to whether some

<sup>1</sup> Although the Respondent indicates that the date was June 23, 1992, this was apparently an error which was prompted by the General Counsel's own error in the complaint. In accordance with the General Counsel's request, we have corrected the date in the complaint to July 23, 1992, and we therefore also presume that this was the date the Respondent intended.

form of remedy under *Laura Modes Co.*, 144 NLRB 1592 (1963), is warranted.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

As for the Respondent's newly alleged affirmative defenses that the Union has itself refused to bargain in good faith and has engaged in secondary conduct,<sup>2</sup> we find that even accepting as true that such alleged misconduct occurred, it would not warrant rescission of the Union's certification under *Laura Modes*. See *Holiday Inn Palo Alto-Stanford*, 298 NLRB 521 fn. 2 (1990), and cases cited there. Nor do we find that it would warrant withholding a bargaining order. While a certified union's refusal to bargain in good faith, if proven, might in certain circumstances excuse a respondent employer's failure to bargain,<sup>3</sup> this is a somewhat different situation since the Respondent has essentially conceded in its answer that it would have refused to bargain with the Union anyway in order to test the Union's certification, and thus the Respondent would presumably have refused to bargain irrespective of the Union's allegedly unlawful conduct at the July 23, 1992 meeting. In these circumstances, and taking into account the Respondent's expressed desire to challenge the Union's certification before the court of appeals, we find that no purpose would be served by withholding a bargaining order at this point, and leave to compliance whether the Respondent may be excused from complying with the bargaining order because of the Union's alleged refusal to bargain in good faith.

Accordingly, we find that the Respondent has not raised any material issue of fact requiring a hearing, and we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

**FINDINGS OF FACT**

**I. JURISDICTION**

The Respondent, a corporation with an office and place of business in Carmi, Illinois, a yard operation in East Carmi, and a sand and gravel dredge operation in Maunie, Illinois, has been engaged in the truck transportation of mine refuse and construction materials and the commercial and residential construction

<sup>2</sup> Respondent's motion for leave to amend its answer to include its additional affirmative defenses is granted.

<sup>3</sup> See *Nassau Insurance Co.*, 280 NLRB 878 (1986).

and repair of concrete and asphalt roads, parking lots, and driveways.

During the 12-month period ending July 31, 1992, the Respondent, in conducting its business operations, provided services valued in excess of \$50,000 for enterprises within the State of Illinois, which enterprises meet an appropriate standard for the assertion of jurisdiction on other than solely an indirect basis.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. *The Certification*

Following the election held April 8, 1992, the Union was certified on May 6, 1992, as the collective-bargaining representative of the employees in the following appropriate unit:

All construction laborers employed by the Employer at its heavy and highway construction jobsites, EXCLUDING all drivers, operators, office clerical and professional employees, guards, and supervisors as defined in the Act, and all other employees.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

### B. *Refusal to Bargain*

Since June 2, 1992, the Union has requested the Respondent to bargain and, since July 23, 1992, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

## CONCLUSION OF LAW

By refusing on and after July 23, 1992, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent

begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enf'd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enf'd. 350 F.2d 57 (10th Cir. 1965).

## ORDER

The National Labor Relations Board orders that the Respondent, O'Daniel Trucking Co., Carmi, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Southern Illinois Laborers' District Council, affiliated with Laborers' International Union of North America, AFL-CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

All construction laborers employed by the Employer at its heavy and highway construction jobsites, EXCLUDING all drivers, operators, office clerical and professional employees, guards, and supervisors as defined in the Act, and all other employees.

(b) Post at its facility in Carmi, Illinois, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 14 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>4</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Southern Illinois Laborers' District Council, affiliated with Laborers' International Union of North America, AFL-CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All construction laborers employed by the Employer at its heavy and highway construction jobsites, EXCLUDING all drivers, operators, office clerical and professional employees, guards, and supervisors as defined in the Act, and all other employees.

O'DANIEL TRUCKING CO.